TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 39

JOSE MARIA GASTELUM-QUINONES,
PETITIONER,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES.

No. 293

JOSE MARIA GASTELUM-QUINONES,
PETITIONER,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 39 PETITION FOR CERTIORARI FILED OCTOBER 27, 1961
NO. 293 PETITION FOR CERTIORARI FILED AUGUST 1, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. DEPARTMENT OF JUSTICE

DECISION—November 14, 1957

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones, aka Joe Gastelum aka Joe Vega

In Deportation Proceedings

Appeal

On Behalf of Respondent:

William M. Samuels, Esquire, 2334 Brooklyn Avenue, Los Angeles 33, California; and

Maynard J. Omerberg, Esq., 1741 N. Ivar Avenue, Hollywood 28, California.

Charges:

Order: Sec. 241(a), I&N Act (8 USC 1251(a))—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Lodged: None.

Application: None.

This is an appeal from the order of the special inquiry officer requiring respondent's deportation upon the ground stated above.

The special inquiry officer found that the respondent, a 57-year-old native and national of Mexico had been a resident of the United States since 1920 and that he had been a member of the Communist Party of the United States in Los Angeles, California after his entry. This finding was based upon testimony of witnesses Elorriaga and Scarletto. The respondent refused to testify on a claim of privilege. He made no application for discretionary relief.

The testimony is set forth in greatest detail by the special inquiry officer. There is no necessity to repeat it.

Counsel raises procedural objections. We have examined these carefully and find no prejudicial error was committed by the special inquiry officer. Respondent was informed of the nature of the proceedings. The charges against him were clear. He was represented by able counsel who was given the widest latitude in conducting his defense.

Counsel contends the record does not establish that respondent's membership was voluntary. The testimony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, [fol. 2] an attempt was made to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary.

The fact of Communist Party membership could be found upon the testimony of witness Scarletto alone. Scarletto collected Communist Party dues from the respondent; he attended many closed meetings of the Communist Party with him; and he observed the respondent over a reasonable period of time. Counsel attacks the reliability of Scarletto's recollection by pointing out that respondent had considerable difficulty in recalling dates concerning events personal and otherwise which were more recent than the fact of the respondent's membership. While the record reveals that the witness at first blush was unable to recall information concerning dates, at the conclusion of his testimony, both direct and on cross-examination, the information requested was elicited with considerable certainty. Moreover, despite the weakness he revealed in specifying the time of the occurrence of an event with exactness, his recollection for ordinary events of his life concerning

employment and places of residence appeared to be at least average. His recollection of his membership in the Communist Party, his recollection of collecting dues from the respondent, and their association together in a Communist Party unit was testified to with certainty and despite the intensive cross-examination to which the witness was subjected on three different occasions is unshaken. The witness's testimony concerning his association with the respondent gains added importance from the fact that it was the witness's task to observe on the activities and membership of the Communist Party as an informant for the Federal Bureau of Investigation.

In evaluating the witness's testimony we have taken into consideration the fact that he falsified his state of health when he applied for a policy of insurance in I.W.O. We have considered his explanation that he did this because at the instruction of the Federal Bureau of Investigation, he attempted to become a member of I.W.O., and feared that he would be rejected if his disability were disclosed. He testified that he made no claim for benefits under his policy and he showed a complete lack of interest in the facts concerning the issue of the policies to him. The witness testified that he falsified the information concerning his state of health because he believed it to be necessary in doing his duty. However, he stated flatly, that he did not believe it to be his duty to furnish untrue information at the deportation proceeding concerning respondent's membership and that he would not furnish false information. We have also taken into consideration the fact that at the outset the witness was not frank in regard to his marital history. However, we have noted that he furnished complete information upon being pressed on the point.

[fol. 3] Counsel's objection concerning the witness's refusal to furnish information concerning the nature of his employment at an aircraft firm relates to a collateral matter. The witness did furnish the name of his employer and the period of his employment. We believe that it was proper to honor his claim that he could not reveal the nature of his employment. Counsel had ample opportunity to seek the information he desired from respondent's em-

ployer who may have felt free to release the information. In any event, respondent furnished sufficient information to enable an investigation to be made as to his reputation among his fellow employees and his employer.

Witness Elorriaga's testimony that the respondent was a member of the Communist Party in 1949 and 1951 is not inconsistent with the testimony of witness Scarletto. Moreover, witness Scarletto testified that Elorriaga had been a member of the Communist Party unit at the same time that respondent had been a member. In evaluating the testimony of Elorriaga we have taken into consideration the fact that he failed to furnish information concerning his membership in the Communist Party when he applied for employment. The contention that sufficient opportunity for cross-examination was not permitted is without foundation. Counsel was afforded the widest latitude in conducting his cross-examination.

Counsel's contention concerning Elorriaga's membership in El Sereno Club and the 45th Concentration Unit overlooked the fact that the El Sereno Club continued in existence after the formation of the 45th Concentration Unit.

There is an inconsistency in the testimony of Elorriaga as to the number of times he saw the respondent in attendance at the 45th Concentration Club. The witness testified on May 1, 1956 that he recalled about two or three meetings of the 45th Concentration Club at which he had seen the respondent (p. 165). Previously, on April 30, 1956, he had testified that he had seen the respondent at about three or four meetings a month over a period of about three years (p. 167). We do not find it necessary to resolve the conflict which was not noticed at the hearing since we regard Elorriaga's testimony as corroborative and it establishes that the respondent was a member of the Communist Party.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman

[fol. 4]

BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

DECISION—May 12, 1958

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones, aka Joe Vega

In Deportation Proceedings

Motion

On Behalf of Respondent:

William M. Samuels, Esquire, 2334 Brooklyn Avenue, Los Angeles 33, California; and

Maynard J. Omerberg, Esquire, 1741 N. Ivar Avenue, Hollywood 28, California.

Deportable: Section 241(a), I&N Act (8 USC 1251(a))—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Application: Motion for reconsideration.

On November 14, 1957 we dismissed the respondent's appeal from the order of the special inquiry officer finding him deportable upon the ground stated above. Counsel has now submitted a motion for reconsideration of this order because of his belief that the decision in *Rowoldt* v. *Perfetto*, 355 U.S. 155, 2 L. Ed. 2d 140 requires the finding that the respondent's membership did not meet the requirement of meaningful association which the Supreme Court has set as a standard. The motion requests that, in the event reconsideration is denied, proceedings be reopened to enable the respondent to offer testimony to show that he can place himself within the framework of the rule laid down in *Rowoldt*. The Service has presented a memorandum in opposition to the motion and counsel for the respondent has submitted a reply memorandum.

The respondent refused to testify on the claim of privilege. Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness, Elorriaga.

[fol. 5] *Rowoldt* concerned an alien who had been a resident of the United States since 1914, had joined the Communist Party in 1935 and had remained a member until the end of the year. The Supreme Court set forth extracts from a statement he had made showing that his joining was not motivated by dissatisfaction with living under democracy, but was a fight for something to eat and clothes and shelter; and that the method to obtain this was to petition city, state and national governments. One other extract was quoted to show that the only active work the respondent had done in the Communist Party was to assist in the running of a bookstore at which Communist Party literature was sold. Rowoldt's recital of the circumstances which lead him to rejoin the Communist Party was not contradicted by evidence. The court held that "the unchallenged account given by the petitioner of his relations to the Communist Party [does not establish] the kind of meaningful association required" and that from Rowoldt's "own testimony in 1947, which is all there is, the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implications."

The obvious and most striking difference between *Rowoldt* and the instant case is that in *Rowoldt*, the sole information as to the existence of membership came from the respondent. He told why and how he had joined. From his explanation, there was nothing to show that he had joined the Communist Party of the United States knowing it to have been a political organization. The requirement that the membership must have been with such knowledge was laid down in *Galvan* v. *Press*, 347 U.S. 522. In short, the burden of proof, which was upon the Government, was not

met by evidence which was reasonable, substantial and probative.

In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party.* Quite different then is the situation in the instant case from that [fol. 6] in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications. This type of a balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to "crawl into." This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield,* 252 F. 2d 191, C.A. 6, February 14, 1958)

The respondent requests reopening of proceedings to offer testimony which he alleges will place him within the frame-

work of *Rowoldt*. The respondent has had since 1953 to present the facts but has failed to do so. Normally, reopening would be denied. However, we shall reopen proceedings because we believe it to be in the best interest of both the government and alien. If judicial review is sought in this case and the court declares that we are wrong in our evaluation of *Rowoldt*, the Service, if it has evidence bearing on the nature of the respondent's membership, will be required to bring new proceedings, and the respondent will be faced with the prospect of defending himself before the administrative authorities and perhaps again seeking judicial review. Government witnesses appear to be available. There was little development of the respondent's awareness of the fact that he belonged to a political organization. We have previously pointed out that there is some confusion in the testimony of Elorriaga. In view of all these factors, proceedings will be reopened and the respondent will be permitted to present such evidence as may be appropriate.

Order: It is ordered that the outstanding order of deportation be and the same is hereby withdrawn.

It Is Further Ordered that proceedings be reopened in accordance with the foregoing and for such further purposes as the special inquiry officer may find appropriate.

Thos. G. Finucane, Chairman

[fol. 7]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

Los Angeles 13, California

REOPENED HEARING—December 16, 1958

Deportation Proceedings

In the Matter of

JOSE MARIA GASTELUM-QUINONES

Also known as JOE GASTELUM, JOE VEGA

File A 5 176 004

Place of Hearing: Los Angeles, California

Persons Present:

Special Inquiry Officer: Louis L. Mattel

Examining Officer: Richard L. Lay

Stenographer: Caron Rhodes

Respondent's Counsel:
Maynard J. Omerberg, Attorney at Law, 1741 No. Ivar Ave., Hollywood 28, Calif.

Respondent: Jose Maria Gastelum-Quinones

Hearing conducted in the English Language.

Special Inquiry Officer: (Hereinafter designated as Inquiry Officer)

During 1956 the respondent, Jose Maria Gastelum-Quinones, also known as Joe Gastelum or Joe Vega, was accorded a hearing in deportation proceedings before me. On February 28, 1957, I entered my decision ordering that the respondent be deported on the charge contained in the

order to show cause, namely, that after entry he had been a member of a section, subsidiary, branch, affiliate or subdivision of the Communist Party of the United States.

Under date of November 14, 1957, the Board of Immigration Appeals ordered that the respondent's appeal be dismissed. By motion filed on January 13, 1958, respondent's counsel requested reconsideration on the basis of *Rowoldt* v. *Perfetto*, or that the respondent be granted an opportunity "to offer testimony to show that he in fact can place himself within the framework of the rule laid down in *Rowoldt*."

By decision dated May 12, 1958, the Board of Immigration Appeals directed that the outstanding order of deportation be withdrawn and that the proceedings be reopened. Upon due notice to the respondent and counsel, the reopened hearing has been set for today, December 16, 1958.

To Respondent:

Q. Do you understand and speak English?

A. I do.

Q. Are you the same Jose Maria Gastelum-Quinones who appeared before me for hearing during 1956 in deportation proceedings to which I previously referred?

A. I am.

[fol. 8] Q. What is your present home address, please?

A. 1800 Bridge Street, Los Angeles 33.

Q. Mr. Gastelum, are you still represented by Mr. William M. Samuels, or only by Mr. Omerberg, who is now present?

A. By Mr. Omerberg.

Q. Will you please stand and raise your right hand: Do you solemnly swear that the testimony you give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Inquiry Officer to Counsel: Mr. Omerberg, you may proceed.

Counsel: I have a statement, and that statement is going to constitute all of the respondent's presentation at this time. I was very surprised when the Board of Immigration

Appeals reopened this matter at what it says was respondent's request to offer testimony, having filed a memorandum which speaks for itself, and which is approximately a page and a half long, and which set forth the reasons why this matter should be reopened under *Rowoldt*, and then as a kind of logical afterthought in the last four lines said: "In any event respondent should be granted the right to offer testimony" if he wanted to, and the Board has construed this as a request to reopen for the opportunity of offering testimony.

My only point was that on a logical basis where neither the Government nor the respondent were aware of the *Rowoldt* requirements, because *Rowoldt* didn't exist at the time of the hearing, that it would be logical to reopen it for no other reason.

On behalf of the respondent I have reexamined the record and I am still satisfied that under *Rowoldt* respondent's deportation order should be set aside and that no further testimony is necessary. I would like to make a couple of comments in this respect. The Board in its decision said that the obvious and most striking difference between *Rowoldt* and the instant case is that in *Rowoldt* the sole information as to existence of membership came from the respondent, and they go on to say that in *Rowoldt* the respondent told why he had joined and how he had joined, and what the Board is doing is making out of the Supreme Court's language "meaningful political association", apparently making out of that language meaningful political joining, which is not what the Supreme Court said, and what the Board has done in this case is attempt to in the absence of an explanation for the joining assumed that there need be no evidence as to the nature of the association. [fol. 9] I submit that there is no evidence in this case as to the nature of the association, that the only difference between this record and the *Rowoldt* record in terms of what constitutes meaningful political association is that in *Rowoldt* there was a membership of some months, which I forget the exact number of, and here a record that shows at best approximately 18 months. There is no evidence of record of holding office or any kind of particular activity which could allow anyone to construe this as meaningful political association, and for those reasons respondent feels

that no prima facie case has been made out and therefore I feel that it is unnecessary to offer any further evidence.

Inquiry Officer to Counsel:

Q. Am I correct, then, Mr. Omerberg, that your statement just made for the record is the extent of the respondent's case and that no further documentary evidence or testimony by the respondent or any witnesses will be submitted at this time?

A. That is correct, with one qualification, and that is that it is assumed, of course, that all the records, statements, documents and evidence heretofore made a part of the record is also part of the record of this hearing.

Q. That is correct.

A. Otherwise that is correct. No witnesses will be offered, no testimony will be offered.

To Examining Officer:

Q. Mr. Lay, do you have any evidence or witnesses to present at this time?

A. Nothing.

Inquiry Officer: I will reserve decision in the respondent's case, and at such time as my decision is entered typewritten copies thereof will be served on respondent's counsel and on the Examining Officer.

Counsel: I would like to make one more comment, in view of what the Service has just indicated, and that is that it strikes me that in the number of years the Immigration Service has had this case and at least in the number of years since the original decision of the Board, that the logic which the Board of Immigration Appeals seeks to apply to respondent is equally applicable to the Immigration Service, and that is that if they had evidence which would show meaningful political association they certainly have no excuse for not presenting it at this time, and that it would behoove them to present it by this time, and the absence of such evidence would indicate that the most meaningful political association which could be shown to exist by the evidence in their possession has already been introduced.

Inquiry Officer: At the time that the copies of my decision are served upon respondent's counsel and the Examining Officer, all interested parties will be fully advised regarding all rights of appeal. There being nothing further, the hearing is closed.

I Certify that to the best of my knowledge and belief, the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, excluding statements made off the record.

Caron Rhodes, Stenographer.

Date transcript completed: December 17, 1958.

[fol. 10]

BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

DECISION—May 18, 1959

File: A5-176-004—Los Angeles

In re: Jose Maria Gastelum-Quinones

In Deportation Proceedings

Appeal

Oral Argument: February 4, 1959

On behalf of respondent:
David Rein, Esquire, 718 Sheraton Bldg., 711—14th St., N. W., Washington, D. C.

On behalf of I&N Service:
Irving A. Appleman, Esquire

Charges:

Order: Section 241(a)—I&N Act—After entry, member of a section, subsidiary, branch, affiliate or subdivision of the Communist Party of the United States.

Lodged: None

This is an appeal from the order of the special inquiry officer requiring respondent's deportation. The facts have been fully stated in previous orders. Briefly, respondent a 49-year-old male, a native and citizen of Mexico, has been a resident of the United States since 1920. On the basis of evidence introduced by the Service, he was found to have been a member of the Communist Party from late 1948 or early 1949 to at least the end of 1950. Respondent did not testify on a claim to privilege. The Board dismissed his appeal from the Special Inquiry Officer's order of deportation. Proceedings were ordered reopened by this Board after the respondent had filed a motion asking for reconsideration of the case in view of the decision in *Rowoldt* v. *Perfetto*, 355 U.S. 155, and stating that "In any event, respondent should be granted the right to offer testimony to show that he in fact can place himself within the framework" of *Rowoldt*. In considering the motion we pointed out that respondent did not fall within the rule in Rowoldt but we ordered reopening of proceedings to enable the respondent to present the testimony which he apparently desired to give and to enable the Service to present any additional evidence if it desired. Upon the reopened hearing, neither the respondent nor the Service offered any additional evidence. At oral argument counsel stated he [fol. 11] had no dispute with the Board's findings of the facts but did dispute the Board's application of law to the facts.

Both sides are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman

[fol. 12]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,429

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, Appellee.

Appeal from the United States District Court for the District of Columbia

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OPINION—Decided December 8, 1960

Mr. David Rein, with whom Mr. Joseph Forer was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before Edgerton,* Danaher and Bastian, Circuit Judges.

BASTIAN, Circuit Judge: This is an appeal from a judgment of the District Court dismissing appellant's [plain- [fol. 13] tiff's] complaint for review of an order of deportation issued by the Board of Immigration Appeals [Board]. The order complained of was issued pursuant to authority delegated to the Board by the Attorney General under § 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(6), which reads in pertinent part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

• • • • •

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* Judge Edgerton took no part in the consideration or decision of this case.

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

• • • • •

"(C) Aliens who are members of . . . the Communist Party of the United States . . ."

Appellant, a Mexican national, first entered the United States in 1920 and has resided here since that time. On February 28, 1957, a special inquiry officer of the United States Department of Justice, Immigration and Naturalization Service, after hearing on a rule to show cause issued March 23, 1956, found that, after his aforementioned entry into the United States, appellant was a voluntary member of at least two units of the Communist Party of the United States in Los Angeles, California. At the hearing, although voluntarily placed under oath, appellant, upon advice of counsel, invoked the Fifth Amendment and refused to testify. Appellant was accordingly ordered deported.

On November 14, 1957, the Board, to which appellant had appealed, ordered the appeal dismissed on the basis of the testimony before the special inquiry officer and his findings. The Board, in the appellate proceeding, stated that appellant was represented by able counsel, who was given the widest latitude in conducting his defense. Reviewing the testimony, the Board said:

"Counsel contends the record does not establish that respondent's membership was voluntary. The testi- [fol. 14] mony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, an attempt was made to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary."

We think the record amply supports this finding.

About one month later, on December 9, 1957, the Supreme Court rendered its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). On the basis of that decision and at appellant's request, the Board reopened the case so that, in the Board's words, "[appellant] will be permitted to present such evidence as may be appropriate [to place his case within the framework of Rowoldt]."

All that occurred at the reopened hearing before the special inquiry officer was that appellant's counsel made a statement to the effect that the evidence of record did not establish the "meaningful association" adverted to in *Rowoldt*, that a *prima facie* case did not exist and, therefore, that it was unnecessary to offer any further evidence. Accordingly, appellant again did not take the stand nor offer any evidence.

After the second and abortive hearing, the special inquiry officer filed his second opinion, calling attention to the fact that appellant had refused to testify during the original hearing, on a claim of privilege, and added:

> "Although the respondent's motion requested reopening of the proceedings to offer testimony which he alleged would place him within the framework of *Rowoldt*, and despite the fact that the Board of Immi- [fol. 15] gration Appeals granted the reopening for said purpose, the respondent failed to testify, to offer any documentary evidence, or to present any witnesses at the reopened hearing."

Calling attention to the fact that, despite the reopened hearing, the sum total of the evidence of record was exactly the same as it was when the decision of February 28, 1957, was entered and that the only new development was the Supreme Court's *Rowoldt* decision, the special inquiry officer proceeded to compare *Rowoldt* with the instant case, holding them to be clearly distinguishable, quoting from the decision of the Board in ordering reopening of the case as follows:

> "In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor

as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political part. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party.* Quite different then is the situation in the instant case from that in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Community Party may well have been wholly devoid of any political implications. This type of a balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a [fol. 16] political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to 'crawl into.' This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield,* 252 F.2d 191, C.A. 6, February 14, 1958)"

The special inquiry officer, therefore, reaffirmed his original findings of fact and conclusions of law and, there

being no request for discretionary relief, again ordered deportation. The appeal taken from that order was dismissed by the Board on May 18, 1959, the Board concluding its opinion as follows:

> "Both sides are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed."

Thereupon, appellant filed in the District Court his complaint for review of the deportation order, and for declaratory judgment and injunctive relief. On cross motions for summary judgment, the Board's motion for summary judgment was granted, that of appellant was denied, and the complaint was dismissed. This appeal followed.

Appellant's principal contention is that *Rowoldt* established a concept of "meaningful association" which requires the Government to show something more than mere membership in the Communist Party before a deportation order can validly be issued. In considering this contention, involving as it does the meaning of a recent Supreme Court decision, a brief study of the development of the present law will be helpful.

[fol. 17] It is well settled that an alien who is in the United States must be afforded procedural due process before he may be constitutionally deported. *Ng Fung Ho* v. *White*, 259 U.S. 276 (1921), *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1947). Under the Alien Registration Act of 1940, 54 Stat. 670, the pertinent ground for deportation was advocacy of the overthrow of the United States Government by force and violence. This ground was upheld as consistent with due process in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951). Under the Act of 1940 it was necessary in each deportation case involving membership in the Communist Party to prove that the individual advocated overthrow of the government by force and violence. The position of the Communist Party itself was immaterial.

The Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, dispensed with the need for proving, in each individual case, that the alien involved advocated overthrow

of the government by force and violence, and made Communist Party membership the test. The Supreme Court upheld this lessened burden of proof as constitutional in *Galvan* v. *Press*, 347 U.S. 522 (1954). In *Galvan* the Court placed great emphasis on a detailed legislative finding, contained in § 2(1) of the Act that:

> "[The] Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship . . . " At page 529.

The section here involved was then in effect in its present form. The Court held that the word "member" as used in 8 U.S.C. § 1251(a)(6)(C), the section involved here, was not limited to those "members" of the Communist Party who are fully cognizant of and who endorse the Party's advocacy of violence.

> [fol. 18] "It must be concluded . . . *that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization,* and that he did so of his own free will." [Emphasis supplied.] Galvan v. Press, *supra*, at page 528.

In *Galvan* the Supreme Court also mentioned that, "Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only . . . ," thus lending inferential support to the Government's view that the burden is on the alien to show that his Party membership was something other than bare organizational membership.

Under the 1940 Act, membership in the Communist Party was not a ground for deportation, but actual personal advocacy of the overthrow of the government by force and violence was. Under the present Act as inter-

preted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party.

It seems to us that the detailed legislative finding contained in § 2(1) of the 1950 Act and quoted *supra* makes the latter ground consistent with due process. The legislative finding merely states that the Communist Party as a political organization is devoted to the overthrow of the Government of the United States by force and violence, the ground upheld by *Harisiades v. Shaughnessy, supra.* The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legisla- [fol. 19] tive finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the "meaningful association" required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan.* Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.

Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party member-

ship was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand.

We add that the Board "did not draw any inference from the fact of appellant's silence that his testimony would have been adverse to him if given." Nor have we drawn an inference. Whether such an inference may be drawn we need not, under the circumstances of this case, determine. The judgment of the District Court is

Affirmed.

[fol. 20]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

DEPARTMENT OF JUSTICE

File No. A5 176 004

In the Matter of

JOSE MARIA GASTELUM-QUINONES, also known as JOE GASTELUM, also known as JOE VEGA

MOTION TO REOPEN AND RECONSIDER

Comes now the respondent in the above entitled matter and petitions for a reopening of the deportation hearing in this case in order that respondent may introduce evidence as indicated in his attached affidavit, which evidence (a) is relevant, material and crucial in the light of the decision in this case made by the United States Court of Appeals for the District of Columbia Circuit, but (b) was not offered at the hearing previously because neither the respondent nor the Service knew, or could reasonably be expected to know, that the evidence was admissible and material.

The respondent did not testify in the deportation hearing because he was acting on advice of counsel that such testimony was not required because the Service had failed to prove, by reasonable, substantial and probative evi-

dence, that petitioner's claimed membership in the Communist Party constituted a "meaningful association" in the light of *Rowoldt* v. *Perfetto*, 355 U.S. 115. Further- [fol. 21] more, counsel advised respondent that it would not be admissible or relevant testimony for him to testify that he personally never advocated or supported the overthrow of the government by force and violence and that he never knew that this was a tenet of the Communist Party. This latter advice of counsel was based on the Supreme Court's decisions in the *Rowoldt* case, *Galvan* v. *Press*, 347 U.S. 522, and *Harisiades* v. *Shaugnessy*, 342 U.S. 580. The advice was reasonable and was in accord with the understanding and practice of the Immigration Service and the Board of Immigration Appeals.

But in sustaining the order of deportation, the Court of Appeals held, contrary to counsel's advice and contrary to the theory on which the case was tried by the Immigration Service and affirmed by the Board of Immigration Appeals, that an important, and indeed crucial, issue in respondent's case was whether or not he did personally support or espouse advocacy of the overthrow of the government by force and violence. The Court further held that once membership in the Communist Party had been shown, the burden was on respondent to refute a presumption arising from such membership that he supported or espoused the tenet of violent overthrow. Thus the Court stated in its opinion, 286 F. 2d 824 at 828 (emphasis supplied):

> "*The present Act then applies to membership in the organization a presumption of espousal of the doctrine of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof* of membership in the Communist Party, (2) the legislative finding of the nature of the Party, *and (3) the presumption that a member of a political* organization [fol. 22] espouses the tenets of the organization.
>
> "In Rowoldt the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of

advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the 'meaningful association' required by the statute. We do not think that Rowoldt was in any sense a reversal or limitation of Galvan. *Rather, we think that Rowoldt amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.*

"Therefore we think that the statutory scheme which was upheld in Galvan was only explained and not reversed by Rowoldt and remains in effect. *Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation,* the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand."

The Supreme Court denied certiorari, thus letting the [fol. 23] decision of the Court of Appeals stand as the final judicial word and the law of the case.

The result is that respondent has been ordered deported because he failed to offer proof on an issue which he did not know, and could not reasonably be expected to know, was in the case. Furthermore, his lack of knowledge of this issue was shared, and contributed to, by the Board of Immigration Appeals, which even in remanding the case never hinted that this issue was relevant.

It is neither fair nor constitutional to deport petitioner for failing to prove something that neither he nor the Service knew was an issue in the case. The case should, therefore, be reopened to permit respondent to introduce evidence on this issue.

Attached hereto as Exhibit "A" is the affidavit of respondent to the latter effect, and which, in support thereof, he desires to testify.

Respondent has resided in the United States continuously for over forty years. He has been a law abiding, hard working, responsible resident. By his first wife who died in 1940 he had two children whom he raised to be decent, law abiding citizens of the United States, and by whom he has seven living citizen grandchildren with one more expected shortly. When he remarried in 1946 it was to a woman who at the time of the marriage had two children aged 14 and 11, whom he supported and raised as his own, by whom there have been six additional citizen children who regard the respondent as their grandfather. In fact, his stepson and the stepson's two children aged 5 and 2 presently reside with the respondent. Elementary justice should require that respondent not be penalized for relying on the good faith advice of counsel, and he should be allowed to testify to rebut the presumptions of espousal of the doc-
[fol. 24] trines of the Communist Party which a court has said clearly for the first time is not only material and relevant but his right so to do.

Respondent requests the opportunity for oral argument on this motion. The oral argument will be presented by respondent's Washington attorneys, Forer and Rein. Respondent also requests a stay of his deportation pending disposition of this motion.

Respectfully submitted,

Maynard J. Omerberg, Attorney for Respondent.

[fol. 25]

EXHIBIT A TO MOTION

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
FILE NO. A5 176 004

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION TO REOPEN AND RECONSIDER

In the Matter
of
JOSE MARIA GASTELUM-QUINONES

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JOSE MARIA GASTELUM-QUINONES, being first duly sworn, deposes and says:

1. I am the respondent in the above entitled action.

2. I have never advocated, supported or espoused, nor do I now advocate, support or espouse, the overthrow of the government of the United States by force and violence. On the contrary, it is and always has been my belief and desire that changes in our government and society should be accomplished by peaceable and constitutional means. Neither have I ever had any knowledge, understanding or belief that advocacy of the overthrow of the government of the United States by force and violence is a tenet of the Communist Party of the United States.

3. If the deportation hearing is reopened, I will testify to the facts stated in Paragraph 2.

4. I did not take the stand in the deportation hearing [fol. 26] previously, nor did I offer the testimony described

above, because I was advised by my attorney that (1) the Immigration Service had failed to carry its burden of proving that my alleged membership in the Communist Party was a meaningful association, and (2) evidence along the lines stated in Paragraph 2 hereof was not relevant nor admissible.

Dated this 1st day of May, 1961.

/s/ Jose Maria Gastelum-Quinones
Jose Maria Gastelum-Quinones

Subscribed and sworn to before me
this 1st day of May, 1961.

/s/ (Illegible)
Notary Public in and for the County
of Los Angeles, State of California.

[fol. 27]

Before the Board of Immigration Appeals

United States Department of Justice

Decision—August 1, 1961

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones aka Joe Gastelum aka Joe Vega

In Deportation Proceedings

Motion

Oral Argument: June 6, 1961

On behalf of respondent:
David Rein, Esquire, 711—14th Street, N. W., Washington, D. C.

Counsel of Record: Maynard J. Omerberg, Esquire, 1741 North Ivar Avenue, Hollywood 28, California (Did not appear.)

On behalf of I&N Service:
Irving A. Appleman, Esquire.

Deportable: Section 241(a), I&N Act (8 USC 1251(a))—
After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Application: Motion for reopening of proceedings.

This is a motion for reopening of proceedings. It follows judicial review affirming the finding of deportability entered by this Board on May 18, 1959. The motion will be denied.

The respondent, a 41-year-old male, a native and citizen of Mexico, has been a resident of the United States since 1920. We found he was a member of the Communist Party from [fol. 28] about 1948 to at least the end of 1950. At the six deportation hearings held from April 1956 to July 1956, the respondent refused to testify on a claim of privilege. At a hearing reopened on his motion so that he could testify, the respondent offered no evidence on the ground that the Service had failed to make out a case. Reopening is now requested so that the respondent may testify that he did not advocate the overthrow of the Government by force and violence and that he had no knowledge that the Communist Party advocated the overthrow of the Government by force and violence. It is stated that such testimony was not offered previously because it was not known that it was admissible and material.

The Service opposes the motion contending that the respondent has had since 1953 to present the facts and has refused to avail himself of the many opportunities given including one which was granted to him at his request after deportation had been ordered, and that the offer of proof neither contests the existence of membership nor goes to the question of its meaningfulness. The Service, quoting *Jiminez* v. *Barber*, 252 F. 2d 550, C.A. 9, contends that the respondent must take the consequences of the course of defense which he pursued and points to the threat which is offered the deportation process if an alien who has been ordered deported and who has secured administrative and judicial review can upset deportation proceedings by assert-

ing his willingness to testify after having refused when he had an opportunity.

The respondent was ordered deported on the basis of his membership in the Communist Party under a statute whose scheme was explained in *Galvan* v. *Press*, 347 U.S. 522, where the Supreme Court which had been urged to construe the statute "as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence, and who, by so joining, thereby committed themselves to this violent purpose", ruled that the law " * * * appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program." The Supreme Court stated that " * * * it did not exempt 'innocent' members of the Communist Party." The conclusion of the Supreme Court was "that support, or even demonstrated knowledge of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

[fol. 29]

Shortly after the decision in the respondent's case, *Rowoldt* v. *Perfetto*, 355 U.S. 115, was decided. The Service had sought the deportation of Rowoldt who had been a member of the Communist Party for about a year in 1935. Uncontradicted evidence in the record revealed that Rowoldt joined at a time when he had no job and was concerned primarily with obtaining food, clothing and shelter. The Supreme Court held that under the facts presented, Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications and was therefore not "meaningful." After *Rowoldt* was decided, we received a motion from the respondent couched in similar terms to the present motion asking for reconsideration of the case (which we denied) and asking for " * * * the right to offer testimony to show that he in fact can place himself within the framework of the rule laid down in *Rowoldt*, which to his knowledge would have been

to no avail prior to the decision of the Supreme Court * * *." We reopened the proceedings to give the respondent an opportunity to bring himself within the framework of *Rowoldt*. At the reopened hearing, he offered no evidence and refused to testify claiming the Service had failed to make a case.

After the respondent was again found deportable by this Board, he filed a complaint for judicial review. The District Court dismissed the complaint. Appeal to the Circuit Court was dismissed on December 8, 1960 (*Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824, C.A. D.C.). This motion was filed almost five months later (May 4, 1961). It is the respondent's belief that the Court of Appeals in reviewing the administrative proceedings in his case ruled that meaningful association is equivalent to advocacy of the overthrow of the Government by force and violence; that the Court of Appeals believed that the respondent had been given an opportunity to testify with regard to his personal advocacy although the respondent did not have the opportunity for had he offered to testify on this point the special inquiry officer would have ruled it was not material under [fol. 30] *Galvan;* and that the respondent must now be given an opportunity to testify on the issue of belief in force and violence and the Party's advocacy of forceful overthrow.

It requires a far stretch of the imagination to interpret *Gastelum-Quinones* as modifying either *Galvan* or *Rowoldt* making deportation dependent upon proof that the alien or the Party advocated the forceful overthrow of the Government. The Circuit Court quoted language from *Galvan* setting forth the rule that personal advocacy of violence was not a prerequisite to deportation, and in its own words stated: "Under the present Act as interpreted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party." Bearing in mind that the Supreme Court rejected as a defense Galvan's claim that "he was unaware of the Party's true purposes and program" and bearing in mind the reaffirmation of *Galvan* by the

Supreme Court from time to time, it is our belief that an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or unconsciously in appearance only.

In *Gastelum-Quinones* the Circuit Court speaks of permitting an alien to rebut a presumption of the espousal of the basic tenets of the Communist Party which arises from the mere fact that the alien was a member of the Party. Because of the reliance placed by the Circuit Court upon *Galvan* and *Rowoldt*, and its own statement of the meaning of *Galvan*, we think that this language concerning the rebutting of the presumption means only that it is proper to show nominal membership as a defense; i.e., as in *Galvan*, membership that is involuntary, accidental, artificial, or unconsciously in appearance only; or as in *Rowoldt*, membership for the purpose of obtaining food and other necessities by one who presumably would just as well have joined the Salvation Army or one of the major political parties if he could thereby have obtained his necessities.

Counsel believes that *Scales* v. *United States*, 29 L. W. 4581, requires membership to be more than normal before it can be a ground of deportation. Counsel is of the belief that to be more than a normal member one must have devoted all [fol. 31] or a substantial part of his time and efforts to the Party. *Scales* involved the Smith Act under which to obtain a conviction it is necessary to show the existence of active and knowing membership held with the intent of furthering the proscribed purposes of the Party. This is unlike the deportation law which requires the establishment of only voluntary membership in an organization which the alien understood was the political organization known as the Communist Party. In *Scales*, the Supreme Court stated that it had interpreted deportation statutes as requiring "more than the mere voluntary listing of a person's name on Party rolls." *Galvan* is cited as authority. To us the statement in *Scales* indicates no more than the fact that a person who has been a member is not precluded from explaining that his membership was artificial. In the instant

case, there is uncontradicted testimony to show that a voluntary meaningful membership existed.

The respondent has been given an opportunity to show that his membership was nominal. He refused to present evidence on this issue. There is no reason to believe that his membership was nominal. Execution of the deportation order entered upon the administrative proceedings started in March 1956 should not encounter further delay.

Order: It is ordered that the motion be and the same is hereby denied.

/s/ Thos. G. Finucane,
Chairman.

[fol. 32] [File endorsement omitted]

In United States District Court
For the District of Columbia
Civil Action No. 2565-61

Jose Maria Gastelum-Quinones, 1800 Bridge Street, Los Angeles, California, Plaintiff,

v.

Robert F. Kennedy, Attorney General of the United States, Department of Justice, Washington, D. C., Defendant.

Complaint for Review of Deportation Order and for Declaratory Judgment and Injunctive Relief—Filed August 7, 1961

The plaintiff, Jose Maria Gastelum-Quinones, complaining of the defendant, alleges:

1. The Court has jurisdiction of this action under D. C. Code, sections 11-305 and 11-306; 28 U. S. Code, section 2201; and section 10 of the Administrative Procedure Act. 5 U. S. Code, section 1009.

2. The plaintiff is a native and citizen of Mexico. He was admitted to the United States for permanent residence in October 1920, and since then has continuously resided, and now resides, in the United States.

3. The defendant, Robert F. Kennedy, is the Attorney General of the United States. He is in charge of the administration of the statutes of the United States relating to the deportation of certain classes of aliens. His principal office is, and he may be found, in the District of Columbia.

4. Following administrative proceedings which exhausted his administrative remedies, plaintiff was ordered deported by the Attorney General under section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, section 1251(a)(6)(C), on a finding that plaintiff had been a member of the Communist Party of the United States from 1948 or 1949 to the end of 1950.

[fol. 33] 5. Plaintiff thereupon filed suit against the Attorney General in this Court (Gastelum-Quinones v. Rogers, Civil Action No. 1421-59) to review and enjoin the deportation order, alleging that the order was illegal. This Court granted judgment for the defendant on September 25, 1959. On December 8, 1960, the United States Court of Appeals for the District of Columbia Circuit affirmed said judgment (No. 15,429; 286 F. 2d 824), and denied a petition for rehearing on January 9, 1961. On April 3, 1961, the Supreme Court of the United States denied a petition for a writ of certiorari, Mr. Justice Douglas dissenting. On May 8, 1961, the Supreme Court denied a petition for rehearing.

6. Plaintiff's principal contention in the Court of Appeals was that the government had failed to carry its burden of proving that the Communist Party membership attributed to plaintiff constituted a "meaningful association" in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and hence that such membership was not a cause for deportation.

7. The Court of Appeals held, in its aforesaid decision, that:

(a) The deportation statute applies to members of the Communist Party a presumption that they personally espouse the Party's basic tenets of advocacy of the overthrow of the government by force and violence, and it is this personal attitude which warrants deportation.

(b) The *Rowoldt* decision made this presumption rebuttable by the alien. The Court of Appeals held: "Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership."

(c) In the deportation case against plaintiff, the government had made a prima facie case of deportability merely by proving that plaintiff had once been a voluntary member of the Communist Party. Since plaintiff had not offered evidence in the deportation case, having taken the position that the burden of proof was on the government to prove that the membership was a "meaningful association," plaintiff had failed to rebut the statutory presumption that he [fol. 34] had personally espoused advocacy of violent overthrow. Hence the order of deportation was sustained.

8. Prior to the decision of the Court of Appeals, neither plaintiff, his counsel nor the Immigration and Naturalization Service knew, or could have been expected to know, that an alien who had been a member of the Communist Party could successfully defend against deportation by proving that despite his membership he had not personally espoused advocacy of violent overthrow of the government. On the contrary, plaintiff, his counsel and the Immigration and Naturalization Service believed, and had reasonable grounds to believe, that such proof would not constitute a defense.

9. On May 4, 1961, plaintiff filed with the Board of Immigration Appeals a motion that the deportation proceedings be reopened in order to permit plaintiff to introduce evi-

dence that he had never advocated, supported or espoused the overthrow of the government of the United States by force and violence and had never had any knowledge or belief that such advocacy is a tenet of the Communist Party of the United States. The motion was supported by affidavits of plaintiff and his counsel to the effect that if the proceeding were reopened plaintiff would testify as indicated in the preceding sentence; and that he had not testified to that effect in the preceding deportation hearings only because he had relied on the reasonable advice of his counsel that such testimony was not, under the law as it then existed, relevant and material and that it would not be admitted at the hearing.

10. The Board of Immigration Appeals granted oral argument on the motion to reopen. On August 1, 1961, the Board issued a decision and opinion ruling that the evidence proffered by plaintiff was not material and denying the motion.

11. The denial of the motion to reopen was and is erroneous, unconstitutional and illegal in the following respects:

(a) The evidence proffered was relevant, material, and in fact crucial under the decision of the Court of Appeals [fol. 35] in plaintiff's case. The holding of the Board of Immigration Appeals to the contrary is erroneous and violates the law of plaintiff's case established by the decision of the Court of Appeals.

(b) The erroneous legal theory of the Board of Immigration Appeals resulted in an erroneous and illegal refusal of the Board to exercise its discretion to reopen the deportation proceeding. If the Board in fact exercised its discretion, it did so arbitrarily and capriciously.

(c) The denial of the motion violates due process of law since it will, unless prevented by this Court, cause plaintiff to be deported without his having had a reasonable and fair opportunity to introduce relevant and material evidence in the deportation proceeding and to present a valid and meritorious defense therein.

(d) The deportation statute as construed and applied by the defendant and his agents is unconstitutional, being violative of due process, the First Amendment, and the prohibitions against bills of attainder and ex post facto laws.

12. Unless enjoined by the Court, the defendant will take plaintiff into custody and deport him. Such action will be illegal and unconstitutional because of the illegal and unconstitutional denial of plaintiff's motion to reopen the deportation proceeding.

13. By the aforesaid actions and threatened actions of the defendant, the plaintiff is threatened with imminent and irreparable injury for which he has no adequate remedy at law.

14. Plaintiff has exhausted his administrative remedies.

15. Plaintiff is presently at large on administrative bond He is not a security risk, is not engaged in, is not likely to engage in, and has no intention of engaging in, activities detrimental to the safety or interests of the United States.

Wherefore, plaintiff demands judgment (1) declaring that the refusal to reopen the deportation proceeding is invalid and that plaintiff may not lawfully be deported [fol. 36] under the outstanding deportation order; (2) enjoining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, from deporting plaintiff, requiring him to surrender to deportation, taking or holding him in custody under or in connection with the deportation order, or otherwise enforcing or giving effect to such deportation order; (3) granting such other and further relief as may be appropriate. Plaintiff also prays for a preliminary injunction enjoining the defendant as aforesaid pending the trial and disposition of this cause, and for an appropriate temporary restraining order.

Joseph Forer, David Rein, 711 14th St. N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 37] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

MOTION FOR PRELIMINARY INJUNCTION—
Filed August 7, 1961

The plaintiff, by his attorneys, moves for a preliminary injunction enjoining and restraining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, pending the final disposition of this action, from deporting or attempting to deport plaintiff, requiring him to surrender for deportation, or taking him into custody under or in connection with the deportation order against him.

The grounds for this motion are that unless so restrained the defendant will take plaintiff into custody and deport him before this cause can be determined, thereby causing plaintiff irreparable injury.

In support of this motion, plaintiff refers to the complaint, the annexed affidavit of Joseph Forer, and such further supporting affidavits as may subsequently be filed herein.

Joseph Forer, David Rein, Attorneys for Plaintiff.

[Handwritten notation—Aug. 9, 1961, Motion for Preliminary Injunction set for 1:45 P.M. Aug. 10, 1961, Leonard P. Walsh]

[fol. 38] [File endorsement omitted]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 7, 1961

A preliminary injunction should be granted to prevent the irreparable injuries of deportation or being taken into custody for deportation.

Rubinstein v. Brownell, 92 U.S. App. D.C. 328, 206 F. 2d 442.

Lim Fong v. Brownell, 215 F. 2d 683 (App. D.C.).

Joseph Forer, David Rein, Attorneys for Plaintiff.

[fol. 39] [File endorsement omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 7, 1961

District of Columbia, ss:

DAVID REIN, being duly sworn, deposes and says:

1. I represented plaintiff in the deportation proceedings against him and in the prior litigation involving the deportation order. The deportation order against plaintiff has become administratively final, and all administrative remedies have been exhausted. On August 1, 1961, the Board of Immigration Appeals denied the motion to reopen described in paragraph 9 of the complaint.

2. On information and belief, plaintiff is not a security risk, is not engaged in or likely to engage in activities detrimental to the safety of the United States, is of good character, and has a reputation for good character.

3. The record in the prior litigation shows that plaintiff entered the United States for permanent residence in 1920 at the age of 10; that he has resided in the United States continuously since that date; that he is married and supports his wife; that he has two children born in the United States; and, as of May 26, 1959, five grandchildren born in the United States. That record also contains an affidavit from the plaintiff, executed on May 26, 1959, that he is not a

member of the Communist Party or of any organization [illegible] that to his knowledge or belief advocates violent overthrow of the government; that he is not engaged in and has no intention of engaging in activities inimical to the safety or interests of the United States; that during the deportation proceeding, he was enlarged on administrative bond. Because plaintiff lives in California, there has not been time, as of the execution of this affidavit, to obtain from him an up-to-date affidavit on these matters.

DAVID REIN.

Subscribed and sworn to before me this 7th day of August, 1961.

Mary E. Rosenthal, Notary Public. My Commission Expires August 31, 1964.

[fol. 41] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 9, 1961

State of California,
County of Los Angeles, ss:

JOSE MARIA GASTELUM-QUINONES, being first duly sworn, deposes and says:

1. I am the plaintiff in the above action.

2. I have resided in the United States since October 1920, when I entered this country at the age of ten. I am married and support my wife. I have twin children, age 26, who were born in the United States and are residents and citizens of the United States. I have eight grandchildren who were born in the United States and are residents and citizens of the United States. My occupation is a counter-man in a restaurant.

3. I am not a member of the Communist Party or of any organization that to my knowledge or belief advocates violent overthrow of the United States government, nor do I personally so advocate. I am not engaged in, and have no intention of engaging in, activities inimical to the safety or security of the United States. During the deportation proceedings I was enlarged on administrative bond.

Jose Maria Gastelum, known in these proceedings as Jose Gastelum-Quinones.

Subscribed and sworn to before me this 5th day of August, 1961.

Delfino Varela, Notary Public in and for the County of Los Angeles, State of California.

Delfino Varela, Notary Public, State of California—Principal Office, Los Angeles County. My Commission Expires May 5, 1963, 2411 Brooklyn Ave., Los Angeles 33, Calif.

[fol. 42] Certificate of Service (omitted in printing).

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

August 14, 1961

The parties having stipulated that plaintiff's motion for temporary restraining order be treated as and joined with his motion for preliminary injunction; this cause having come before the Court for hearing on the application for injunctive relief *pendente lite*; the Court, having considered the record, heard counsel, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

Plaintiff is an alien, a native and citizen of Mexico, who entered the United States in 1920.

II

During the period April-July 1956, plaintiff was accorded a deportation hearing. The deportation charge was that he had been, after entry, a member of the Communist Party in the United States. Plaintiff refused to testify at the hearing. Two Government witnesses testified to plaintiff's membership in the Communist Party. A Special Inquiry Officer found plaintiff deportable as charged.

III

On November 14, 1957 the Board of Immigration Appeals entered its original deportation order on its review of plaintiff's case. Based on the testimony of the two Government witnesses, the Board found: Plaintiff was a member of the Communist Party from late 1948 or early 1949 to at least the end of 1950. For several months an attempt [fol. 44] was made to make plaintiff a leading figure in a Communist Party unit. He paid dues over the period of his membership. And he attended many Party meetings closed to all but members of the Communist Party. Accordingly, the Board concluded that the Government's evidence had established plaintiff's voluntary membership in the Communist Party.

IV

After the Supreme Court had decided *Rowoldt* v. *Perfetto*, 355 U.S. 115, on December 9, 1957, plaintiff on January 13, 1958 moved the Board of Immigration Appeals for reconsideration of the Order of Deportation in light of the *Rowoldt* decision, or for reopening of the deportation proceedings "to enable the respondent [plaintiff] to offer testimony to show he can place himself within the framework of the rule laid down in *Rowoldt*."

V

The Board of Immigration Appeals by an order dated May 12, 1958—although concluding that the evidence established plaintiff's Communist Party membership to have been a "meaningful association" within the meaning of the *Rowoldt* decision—ordered the deportation proceedings reopened to enable plaintiff "to present such evidence as may be appropriate."

VI

At a reopened hearing held before a Special Inquiry Officer on December 16, 1958, plaintiff chose not to testify or offer evidence in any other form. Nor did he advance any claim that his proved membership in and other sup-

port of the Communist Party had been innocent of any meaningful political implications. Instead, he chose to offer merely a statement by his counsel that the existing record did not establish a "meaningful association" within the meaning of the *Rowoldt* decision.

VII

The Board of Immigration Appeals entered its final order in plaintiff's case on May 18, 1959. The Board noted that, although the proceedings had been reopened to enable plaintiff to present testimony, he had not offered any evidence. The Board concluded that the deportation hearing record established plaintiff's Communist Party membership to have been a "meaningful membership." The Board dismissed the appeal. And the Order of Deportation then became administratively final.

[fol. 45]

VIII

On May 22, 1959 plaintiff brought an action (Civil No. 1421-59) in this Court for judicial review of the final Order of Deportation. This Court on September 21, 1959 granted the Government's motion for summary judgment. Plaintiff appealed this Court's adverse decision to the Court of Appeals for the District of Columbia Circuit (No. 15,429).

IX

The Court of Appeals affirmed, by decision dated December 8, 1960, reported at 286 F.2d 824. The Court of Appeals held that the record sustained the finding of the Board of Immigration Appeals that plaintiff's Communist Party membership was meaningful. In reaching this conclusion, the Court of Appeals concluded that under the *Rowoldt* decision, once the Government has made out a *prima facie* case by proving voluntary membership, the burden comes to be on the alien to come forward with an explanation.

X

Plaintiff petitioned the Supreme Court for a Writ of Certiorari to review the Court of Appeals' decision. No.

711, October Term 1960. Certiorari was denied on April 3, 1961, reported 29 LW 3292. Rehearing was denied on May 2, 1961, reported at 29 LW 3335.

XI

Plaintiff then on May 4, 1961 moved the Board of Immigration Appeals to reopen the deportation proceedings. He sought this further reopening of the deportation proceedings, so that he might now testify that he did not advocate the overthrow of the Government by force and violence, and that he had no knowledge that the Communist Party advocated the overthrow of the Government by force and violence. He claimed that such testimony had not been offered previously because he had not known it was admissible and material. And he contended that the Court of Appeals had ruled in its decision in his case that meaningful association with the Communist Party is equivalent to advocacy of the overthrow of the Government by force and violence.

XII

The Board of Immigration Appeals in an order dated August 1, 1961 denied plaintiff's motion for reopening of [fol. 46] the deportation proceedings. The Board ruled: (A) That the Court of Appeals' decision in plaintiff's case is not to be construed as modifying the Supreme Court decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115, or the earlier Supreme Court decision in *Galvan* v. *Press*, 347 U.S. 522 which the *Rowoldt* decision amplified, so as to make deportation dependent upon proof that the alien or the Communist Party advocated the forcible overthrow of the Government of the United States; and (B) That such decision means that the alien must at least make a showing by his explanation or otherwise that his membership in the Communist Party was accidental, artificial, or unconsciously in appearance only, or was for the purpose of obtaining food or other necessities. The Board further ruled as follows:

> . . . In the instant case, there is uncontradicted testimony to show that a voluntary, meaningful membership existed.

The respondent [plaintiff] has been given an opportunity to show that his membership was nominal. He refused to present evidence on this issue. There is no reason to believe that his membership was nominal. Execution of the deportation order entered upon the administrative proceedings started in March 1956 should not encounter further delay.

Conclusions of Law

I

The issues plaintiff raises are unsubstantial. It is wholly improbable that he would prevail on the ultimate merits.

II

There is no error in the Board of Immigration Appeals' rulings that the Court of Appeals' decision in plaintiff's case does not purport to modify the Supreme Court decisions in *Rowoldt* v. *Perfetto* and *Galvan* v. *Press*, *supra*, so as to make deportation dependent upon proof that the alien or the Communist Party advocated the forcible overthrow of the Government of the United States; and that the said decision means that the alien must at least make some showing that his membership in the Communist Party was accidental, artificial, or unconsciously in appearance only, or was for the purpose of obtaining food or other necessities.

[fol. 47]

III

The Board of Immigration Appeals clearly did not abuse its discretion in declining to reopen the deportation proceedings at this time, upon consideration of the following factors: (1) The uncontradicted evidence in plaintiff's case shows that his established association with the Communist Party was a voluntary, meaningful membership; (2) There is no reason to believe—even crediting the testimony he now desires to offer—that his was not a voluntary, meaningful membership in the Communist Party; and (3) Plaintiff's case has already been litigated over a five-year period—from 1956 to 1961—both administratively and on judicial

review in the courts, during which period the plaintiff in 1958 declined to avail himself of the opportunity given him by the reopening of the deportation hearing specifically on his request to be permitted to testify on the issue of meaningful membership in the Communist Party. (See *Rystad* v. *Boyd*, 246 F.2d 246, 248-249 (9th Cir. 1957), *cert. den.* 355 U.S. 912, *reh. den.* 355 U.S. 967 (1958); *Jimenez* v. *Barber*, 252 F.2d 550, 553-554 (9th Cir.), *appl. for stay of deportation denied upon reference to the entire Court* 355 U.S. 943 (1958).)

IV

The deportation of plaintiff on the present record is constitutional and fully in accord with law. Accordingly, plaintiff will suffer no legal injury whatever if he is deported under the outstanding Order of Deportation.

V

Under all of the circumstances of this case, the process of this Court should not be permitted to be utilized so as to occasion further delay in plaintiff's proper deportation pursuant to law.

VI

Consequently, this Court is warranted, both upon the determination that as a matter of law plaintiff will suffer no legal injury, and in the proper exercise of a sound judicial discretion, to deny plaintiff's motion for preliminary injunction.

Counsel for defendant is directed to submit an appropriate order in accordance herewith.

Leonard P. Walsh, United States District Judge.

Dated: August 14th, 1961

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

C. A. No. 2565—61

JOSE MARIA GASTELIUM-QUINONES, Plaintiff,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION—August 14, 1961

Upon the basis of the Findings of Fact and Conclusions of Law herewith entered in this cause, it is this 14th day of August, 1961,

Ordered, that the Plaintiff's motion for preliminary injunction be, and the same is hereby, denied.

It Is Further Ordered, that execution of this Order be, and the same is hereby stayed until 4 o'clock P. M., August 18, 1961.

Leonard P. Walsh, Judge.

Forer & Rein, 711—14th St., N. W., Attorneys for Plaintiff.

Hon. David G. Acheson, United States Attorney, Attorney for the Defendant.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,552—September Term, 1961
District Court Civil Action 2565—61

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Danaher and Bastian, Circuit Judges, in Chambers.

ORDER DENYING A STAY AND AFFIRMING THE JUDGMENT OF THE DISTRICT COURT—Dated September 13, 1961

Upon consideration of appellant's motion for stay of deportation pending appeal and of appellee's opposition and of appellee's motion to affirm the judgment of the District Court, of appellant's opposition and of appellee's reply, it is

Ordered by the court that the motion for stay of deportation is denied and that the judgment of the District Court appealed from herein is affirmed.

Per Curiam.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565—61

JOSE MARIA GASTELUM QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT—Filed October 13, 1961

Comes now defendant by his attorney, the United States Attorney, and moves to dismiss or, in the alternative, for summary judgment on the grounds that the complaint fails to state a claim upon which relief can be granted and that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Attached hereto and made a part hereof is the certified record of proceedings of the Immigration and Naturalization Service pertaining to plaintiff, identified as Defendant's Exhibit No. 1.

David C. Acheson, United States Attorney; Charles T. Duncan, Principal Assistant United States Attorney; Joseph M. Hannon, Assistant United States Attorney; Harold D. Rhynedance, Jr., Assistant United States Attorney.

[fol. 51] Certificate of Service (omitted in printing).

[fol. 52] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565—61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, DISMISSING THE COMPLAINT, ETC.—October 25, 1961

Upon consideration of defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment and plaintiff's opposition thereto, and the Court having considered the complaint and exhibit of record, and after hearing oral argument on behalf of the respective parties in open Court, and the Court having determined that there is no genuine issue of material fact, it is by the Court on this 25 day of October, 1961,

Ordered that the defendant's Motion For Summary Judgment be and the same is hereby granted and the complaint be and the same is hereby dismissed, and it is

Further Ordered that defendant's alternative Motion To Dismiss be and the same is hereby denied as moot.

Alexander Holtzoff, United States District Judge.

[fol. 53] Certificate of Service (omitted in printing).

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,747—September Term, 1961

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Fahy, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER TRANSFERRING CASE TO ANOTHER DIVISION OF COURT—February 21, 1962

Upon consideration of appellee's motion to affirm and of appellant's opposition, it is

Ordered by the court that the motion to affirm is referred to the division of this court which heard and decided *Gastelum-Quinones* v. *Rogers*, 109 U.S. App. D.C. 267, 286 F.2d 824.

Per Curiam.

[fol. 55] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,747—September Term, 1961
District Court Civil Action 2565—61

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Edgerton, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER AFFIRMING JUDGMENT OF THE DISTRICT COURT—February 23, 1962

Upon consideration of appellee's motion to affirm and of appellant's opposition, it is

Ordered by the Court that the judgment of the District Court appealed from in this case is affirmed.

Per Curiam.

Circuit Judge Edgerton took no part in consideration of the above motion.

[fol. 56] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,747

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING BY COURT EN BANC—
Filed March 9, 1962

Appellant petitions for a rehearing before the Court *en banc*.

This appeal involves judicial review of a refusal of the Board of Immigration Appeals to reopen a deportation case against appellant for the purpose of receiving additional evidence.

[fol. 57] The deportation order was upheld by this Court in *Gastelum-Quinones* v. *Rogers*, 109 App. D. C. 267, 286 F. 2d 824. The panel consisted of Judges Edgerton, Danaher and Bastian, but Judge Edgerton did not participate in the decision.

Under the decision, the crucial factor in the affirmance of the deportation order was the failure of appellant to introduce evidence to rebut a presumption held to arise from past membership in the Communist Party) that he personally espoused doctrines of violence.

Appellant then moved the Board of Immigration Appeals to reopen the deportation proceeding in order to allow him

to introduce evidence negating any such espousal on his part. As the motion alleged, appellant had never had a chance to present this evidence before, because both he and the immigration authorities had believed, in the light of relevant Supreme Court decisions, that such evidence was irrelevant. The Board denied the motion on the ground that the evidence was indeed irrelevant.

Petitioner then brought the suit which is here involved. The District Court denied a motion for preliminary injunction. Appellant appealed, and on motion of appellee the judgment was affirmed by this Court without opinion. The affirmance was again by only two judges, Judges Danaher and Bastian.*

Thereafter the District Court granted summary judgment for appellee. Appellant duly entered an appeal, filed the record in this Court, and filed his brief. Appellee then filed a motion to affirm the judgment below. A panel consisting of Judges Fahy, Danaher and Bastian, to whom this appeal had presumably been assigned, thereupon entered an order *sua sponte* transferring the case to the same panel [fol. 58] which had heard the previous appeals. That panel then entered an order affirming the judgment below without argument and without opinion. Again Judge Edgerton did not participate.

Thus each of appellant's three appeals has been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate.

Although we appreciate that two judges constitute a quorum of a panel, the unusual situation which has arisen here seems inconsistent with the spirit of 28 U. S. Code, sec. 46. For this reason we believe that the case should be reheard *en banc*, as the only practicable method by which appellant can have the benefit of consideration by more than two judges. Our briefs in the original appeal and

* By order of Chief Justice Warren, appellant's deportation has been stayed pending Supreme Court disposition of a petition for certiorari from the judgment affirming the denial of a preliminary injunction.

in this appeal set forth the grounds on which we believe that (1) the initial decision was erroneous and based on a mistaken analysis of the applicable statutes and Supreme Court decisions, and (2) that if the initial decision is to be adhered to, then by its reasoning petitioner was entitled to have his deportation case reopened.

Respectfully submitted,

David Rein, Joseph Forer, Attorneys for Appellant.

Certificate

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

David Rein

[fol. 59] [File endorsement omitted]

In United States Court of Appeals
For the District of Columbia Circuit
No. 16,747—September Term, 1961

Jose Maria Gastelum-Quinones, Appellant,

v.

Robert F. Kennedy, Attorney General of the United States, Appellee.

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Bazelon, Fahy, Washington, Danaher, Bastian, Burger, and Wright, Circuit Judges, in Chambers.

Order Denying Petition for Rehearing, En Banc—
May 7, 1962

Upon consideration of appellant's petition for rehearing en banc, it is

Ordered by the court that the petition for a rehearing en banc be, and it is hereby, denied.

Per Curiam.

[fol. 60]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

Los Angeles 13, California

HEARING OF APRIL 13, 1956

By Special Inquiry Officer:

Hearing in Deportation Proceedings

Place of Hearing: Los Angeles, California

File A5 176 004

In the case of

JOSE MARIA GASTELUM-QUINONES
aka JOE GASTELEM aka JOE VEGA

Persons Present:

Louis L. Mattel—
Special Inquiry Officer

William S. Howell—
Examining Officer

William Samuels—
Attorney at Law, Respondent's counsel, 2334 Brooklyn Avenue, Los Angeles 33, California.

Jose Maria Gastelum-Quinones—
Respondent

Conducted in the English language
and recorded by dictaphone:

• • • • • • •

[fol. 61] By Special Inquiry Officer:

Q. Mr. Gastelum, for clarification of the record when you answer questions and state that you refuse to answer on the previous grounds stated, do you want it understood that you are refusing to answer on the basis of the 5th Amendment to the Constitution?

A. That is correct.

You may proceed, Mr. Howell.

• • • • • • •

[fol. 62] By Special Inquiry Officer to Respondent:

Q. Mr. Gastelum, you are advised that you are still under oath. Do you understand?

A. Yes I do.

Special Inquiry Officer to Examining Officer: You may continue, Mr. Howell.

Examining Officer to Respondent:

Q. Mr. Gastelum, have you at any time been a member of the Communist Party of the United States?

By Counsel: Same objections I interposed to Mr. Howell's previous questions.

By Special Inquiry Officer: Objection overruled.

By Counsel: I advise my client.

63] By Respondent:

A. I refuse to answer the question on the basis of my previous reasons.

Examining Officer to Respondent:

Q. Have you at any time been a member of a section of the Communist Party of the United States?

By Counsel: Same objection and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the same basis as previously stated.

Examining Officer to Respondent:

Q. Have you at any time or are you now a member of any branch of the Communist Party of the United States?

By Counsel: Same objections and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis previously stated.

Examining Officer to Respondent:

Q. Are you now or have you ever been a member of any affiliate of the Communist Party of the United States?

By Counsel: Same objections and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis of my previous statement.

[fol. 64] Examining Officer to Respondent:

Q. Are you now or have you ever been a member of any subdivision of the Communist Party of the United States?

By Counsel: Same objection and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis of my previous statement.

By Examining Officer: At this time I desire to call a witness.

By Special Inquiry Officer: Permission granted.

Let the record show that a witness has been called.

• • • • • • •

[fol. 65]

EXCERPTS FROM TRANSCRIPT OF THE DEPORTATION HEARING ACCORDED APPELLANT BY THE IMMIGRATION AND NATURALIZATION SERVICE—May 7, 1956

Testimony of Witness DANIEL SCARLETTO

Special Inquiry Officer to Witness:

• • • • • • •

Q. What is your full name, please?

A. Daniel Scarletto.

• • • • • • •

Direct examination.

Examining Officer to Witness:

* * * * * * *

Q. Were you at one time previously to now, a member of the Communist Party of the United States?

A. Yes.

Q. When did you join the Communist Party of the United States?

A. It was in '47.

Q. In what city were you residing when you joined the Communist Party?

A. Los Angeles.

Q. How did you happen to join the Communist Party in 1947?

A. I was at that time; at that time I joined the Communist Party under the supervision of the F.B.I.

Q. How long did you continue your membership in the Communist Party?

A. Until '52; the Smith Act trials we had here.

Q. Were you a member continuously from 1947 until 1952?

A. Yes.

Q. Did you pay dues into the Communist Party?

A. Yes.

[fol. 66] Q. When, you first joined the Communist Party, were you assigned to any Unit or Section or Subdivision of that Party?

A. The first time I joined, I was assigned to a school, a beginner's class, I think it was called.

Q. For how long a period did this class continue?

A. It went on for several weeks; I can't recall just how long it was; it went on for several weeks.

Q. How often did it meet?

A. Two nights a week.

Q. In what city was this school conducted?

A. In El Sereno, Los Angeles.

Q. El Sereno; is that a district within the City of Los Angeles?

A. Yes.

Q. After this school was terminated, were you then assigned to any Unit or Section of the Communist Party?

A. Yes, I was in the El Sereno Club; the Communist Party Club.

Q. How many members would there have been in the El Sereno Club, approximately?

A. There was approximately 32 members in the El Sereno Club at that time.

Q. To your knowledge, was that the smallest unit of the Communist Party or were there any smaller divisions to your knowledge at that time?

A. That was one of the large divisions which was split up later.

Q. Do you recall when it was that you were assigned to the El Sereno Club?

A. I don't recall just the date that I went into the El Sereno Club, but it must have been early '49, at least.

[fol. 67] Q. Was the El Sereno Club a unit of the Communist Party of the United States?

A. Yes.

Q. Do you recall how long you continued membership in the El Sereno Club?

A. It was only a matter of a few months I was in the El Sereno Club.

Q. Were you then assigned to another unit?

A. Yes.

Q. What was the designation of this other unit to which you were then assigned?

A. The El Sereno Club was split up into smaller units for security reasons, and I was put into the Mexican Concentration Club.

Q. Do you recall what year this took place now?

A. That was in early '49, in the year '49.

Q. Was this Mexican Concentration Club a unit of the Communist Party of the United States, to your knowledge?

A. Yes.

Q. Getting back to the El Sereno Club, do you recall how often that unit met?

A. Yes, the executives met once a week and the whole club would meet once a week.

Q. Did you hold any official position in the El Sereno Club?

A. Yes, I was press director in the El Sereno Club.

Q. As press director, did you meet with the executive group of that club?

A. Yes.

Q. Were there any restrictions upon who could attend the meetings of the regular membership of the El Sereno Club?

A. Yes.

Q. What were those restrictions?

A. Only Commie members were allowed.

Q. By Commie, do you mean members of the Communist Party?

A. Yes.

Q. Referring to the Mexican Concentration Club, were regular meetings of that unit held?

A. Yes.

[fol. 68] Q. How often?

A. One day a week the executives would meet, and then one day a week the club would meet.

Q. Did you hold any office in the Mexican Concentration Club?

A. Yes.

Q. What office did you hold in that club?

A. I was organization secretary.

Q. As organization secretary, what were your duties?

A. My duties was finance, collecting of dues, and sustainers, and handling political literature and taking over duties of the chairman in case the chairman was ever absent.

Q. How long were you a member of the Mexican Concentration Club?

A. I was in the Mexican Concentration Club until the year, '51, and then I was transferred into the Communist underground.

Q. You said this club met on the average of once a week; did you attend most of the meetings of that club?

A. Yes.

Q. Was attendance at these meetings restricted in any way?

A. Yes.

Q. In what way was the attendance of the Mexican Concentration Club restricted?

A. To Communist Party members.

Q. Do you recall what safeguards were taken to make certain that only Communist Party members attended these meetings?

A. Well, we knew each other and no one else was ever attempting to attend that was not a Communist member.

Q. Did you know all of the members personally, yourself?

A. Yes.

Q. Did you know all of them to be members of the Mexican Concentration Club?

A. Yes.

Q. Were these meetings of the Mexican Concentration Club held in any hall, or particularly designated place; did they have a club room?

A. They were held at private homes.

[fol. 69] Q. Were they always held in the same private home or in different homes?

A. They were held in different homes.

Q. Were any of these meetings ever held in your own home?

A. Yes.

Q. Did you hold an official position in this club during your entire period of your membership in the Mexican Concentration Club?

A. No, not at first.

. . . . . .

Q. Now, do you recall about how long it was after you first were assigned to the Mexican Concentration Camp [sic], that you held any official position in that club?

A. Well, just after a couple of months that I was in the club, that I was assigned to the organization secretary job.

Q. How long did you serve in this capacity?

A. I served in that capacity until I was transferred in early '51, to the underground.

Q. Is there anyone in this room, other than myself, whom you have seen or known prior to this occasion?

A. Yes.

Q. Could you point out that person or persons?

A. Yes, Joe Gastelum or Joe Vega; he used two names.

. . . . . .

Q. You have indicated that you were acquainted with the respondent here as Joe Gastelum or Joe Vega; now, did you know him at any time to be a member of the Communist Party of the United States?

A. Yes.

Q. Where did you first meet Joe Gastelum?

A. At a meeting in the El Sereno Club.

Q. Are you referring to the El Sereno Club of the Communist Party of the United States?

A. Yes.

[fol. 70] Q. Do you recall about when that was?

A. '49.

Q. Were you introduced to Joe Gastelum at the time you first met him in the El Sereno Club or saw him in the El Sereno Club?

A. Yes; I was always introduced to new people that I had never seen before.

Q. Was he a member of the El Sereno Club?

A. Yes.

* * * * * * *

Q. Do you know whether he was a member of the El Sereno Club at the time you were assigned to that unit?

A. No, I didn't know it at the time I was assigned because I only knew a couple of people that were in there at the time I went into it.

Q. Did Joe Gastelum attend meetings regularly of the El Sereno Club?

A. I only saw him there a couple of times because I was only in the club for a couple—few months, and I saw him there a couple of times.

Q. On these two occasions in which you say you saw him in the El Sereno Club, were those meetings restricted in any way as to who could attend?

A. Yes, Communist Party members were all they had.

Q. After the El Sereno Club was broken up as you have testified, did you on any other occasion see Joe Gastelum?

A. Yes.

Q. Well, what were those other occasions upon which you saw him?

A. He was in the—we were put into a new group, called the Mexican Concentration group and he was in that same group with me.

Q. Now, when you speak of the Mexican Concentration Group; is that the same as the Mexican Concentration Club?

A. Yes.

Q. Is that—or was that also a unit of the Communist Party of the United States?

A. Yes.

[fol. 71] Q. Did Joe Gastelum attend meetings regularly of the Mexican Concentration Club?

A. Yes. He, just went once in awhile, but he was a regular member.

Q. Over what period of time did you see Joe Gastelum in meetings of the Mexican Concentration Club?

A. Well, from the time I went in it until the time I left it, I saw him there several times.

Q. To your knowledge, was he still a member of the Concentration Club at the time that you terminated your membership in 1951?

A. I don't think so; I think he was transferred out one time for some other kind of work in the Party, but it seems he came back and attended a few meetings after he had been gone for a period; I have forgotten when that period was.

Q. Do you recall how long a period that was?

A. No, I just can't think how long a period it was right now; it was some time ago.

Q. Was he transferred to the Mexican Concentration Club at the same time as yourself?

A. Yes.

Q. Do you know whether his membership continued into the year of 1950?

A. Yes.

Q. You have stated that as part of your duties as organizational secretary that you were responsible for the collection of dues; did you ever collect any dues from Joe Gastelum?

A. Yes; I collected all the dues from all the members.

* * * * * * * *

[fol. 72] Q. Did you collect dues from Joe Gastelum during the entire period of your membership in the Mexican Concentration Club?

A. Except for the time that he was—yes, except for the time that he was transferred out for some other job.

* * * * * * *

Q. To your knowledge was Joe Gastelum—did he ever hold an official position in either the El Sereno Club or the Mexican Concentration Club?

A. No, I don't remember offhand.

Q. Do you recall if any meetings of the Mexican Concentration Club were held in the home of Joe Gastelum?

A. No, I have never been in the home of Joe Gastelum.

* * * * * * *

[fol. 73] Q. Were any meetings ever held in the home of Fabian Elorriaga?

A. Yes, many of them.

Q. Did you ever see Joe Gastelum at any of the meetings of the—that were held in the home of Fabian Elorriaga?

A. Yes, I have seen him there a few times.

Q. Were these meetings Communist Party meetings?

A. Yes.

Q. Were they regular meetings of the Mexican Concentration Club?

A. Yes.

Q. Were those meetings restricted in any way?

A. Yes, to Communist members.

Q. Did you ever attend any conventions or general meetings of the Communist Party outside of the units which you have described?

A. Yes, I attended conventions.

Q. Where were those held, if you recall, and when?

A. I have been to some conventions they had at the Park Manor, I think was the name, out on Western, near Wilshire; they usually attended meetings there, the large ones.

Q. Were those Communist Party conventions?

A. Yes.

* * * * * * *

[fol. 74] Q. What was the nature of these conventions which you attended?

A. Well, they would have discussions on what was going on in the Party, and what drives were coming up.

* * * * * * *

Q. Who attended these various conventions which you saw were held at the Park Manor?

A. All of the executives of the Communist Party.

Q. Did you attend these conventions in an official capacity, yourself?

A. Yes.

Q. Do you know whether Joe Gastelum ever attended any such conventions?

A. I saw him at one convention one time.

Q. Do you recall when that was?

A. It was when I was in the El Sereno Club, we had a convention one time, at Echo Park, at the Echo Park Women's Club, a big hall, they had, and I saw Joe Gastelum there.

Q. Do you know whether he was there on [sic] an official capacity?

A. No.

Q. Was the attendance in this convention restricted in any way?

A. Yes, they were solely restricted to Communist Party members that we had to be identified by a panel to enter.

Q. Do you recall whether on the occasion at which you say you saw Joe Gastelum at the Echo Park Women's Club, was the attendance at that particular meeting so restricted?

A. Yes, you had to face the panel and give your club, your position of that club, and be identified by members that were on the, on this panel, before you were admitted.

* * * * * * *

Q. Could you approximate at this time, about how many meetings of the Mexican Concentration Camp, in which you saw Joe Gastelum?

A. Oh, about 15.

Q. Were all of these meetings restricted to Communist Party members, only?

[fol. 75] A. We had a couple of meetings one time, that wasn't restricted to communist members, as I recall over

some distribution of papers I think, but I think there was just a couple of them that wasn't.

Q. Other than these two meetings, were all of the other meetings in which you saw Joe Gastelum, restricted to Communist Party members only?

A. Yes.

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DATE OF HEARING—April 30, 1956

Testimony of witness FABIAN CASADO ELORRIAGA

Special Inquiry Officer to Witness:

• • • • • • •

Q. What is your full name, please?

A. Fabian Casado Elorriaga.

• • • • • • •

Direct examination.

Examining Officer to Witness:

• • • • • • •

Q. When did you first become a member of the Communist Party of the United States?

A. About August, 1947.

Q. In what city did you become a member of the Communist Party of the United States?

A. In Los Angeles.

Q. For how long were you a member of the Communist Party?

A. Up until August of 1951.

• • • • • • •

[fol. 76] Q. When you first became a member of the Communist Party were you assigned to any unit or section or particular organization of the Communist Party?

A. • • • I was assigned first to the Brooklyn Avenue Club.

Q. • • • How long were you a member of the Brooklyn Avenue Club?

A. About four or five months.

Q. Were you then assigned to another unit?

A. From the Brooklyn Club I was assigned to the El Sereno Club.

• • • • • • •

Q. And how long were you a member of the El Sereno Club?

A. About four years.

Q. Did you become a member of any other unit or section or branch of the Communist Party after that?

A. You mean after '51?

Q. After the El Sereno Club?

A. For a while I was assigned to a smaller unit known as the Forty-Fifth Concentration.

• • • • • • •

[fol. 77] Q. When did you first become acquainted with this person you have identified as Joe Gastelum and Joe Vega?

A. I do not remember the exact year but I met him in the Forty-Fifth Concentration Club of the Communist Party.

• • • • • • •

Examining Officer to Witness:

Q. Under what circumstances did you meet the respondent here today?

A. I met him in meetings of the Communist Party.

Q. Now you have indicated that you were a member of three clubs or units of the Communist Party, in which of these three clubs or units of the Communist Party, did you meet the respondent?

A. In the Forty-Fifth Concentration Club.

Q. Do you know whether he was a member of that club?

A. He was a member of that club.

[fol. 78] Q. Now you say you met him in meetings of that club, how often would you say you saw the respondent in meetings of that club?

A. How often, about maybe three or four meetings a month.

Q. Do you recall over what period time in which you saw the respondent at these meetings—over how long a period of time?

A. Over a period of about three years.

Q. Do you know whether he was a member of the Communist Party?

A. I do.

Q. And how do you know that he was?

A. His presence at the party meetings.

* * * * * * *

Q. Was it possible at all that Joe Vega could have attended these meetings without having been a member of the Communist Party?

A. No, he could not have attended the meetings without being a member of the party.

Q. Do you know whether or not he held any office in the Communist Party?

A. In the smaller units, that is, in the Forty-Fifth Concentration Club he held one form of office.

Q. What was that office?

A. I don't remember. All I know at that time he was an official of the club because he attended a few executive meetings of the Forty-Fifth.

Q. Were you present at these executive meetings?

A. I was present at one meeting that I remember.

* * * * * * *

Q. Where was this so-called executive meeting held if you recall?

A. At the home of a member.

Q. What was the purpose of that meeting?

A. At this time I cannot say definitely the purpose but it was either organizational or to form an agenda for the regular meeting.

[fol. 79] Q. Was attendance at this executive meeting restricted in any way?

A. To Party members and probably officials of the club.

• • • • • • •

Q. To your knowledge when you terminated your membership in the Communist Party was the respondent here still a member?

A. He was.

• • • • • • •

[fol. 80] Redirect examination.

Examining Officer to Witness:

Q. Do you recall if Joe Gastelum was a member of the Brooklyn Avenue Club?

A. He was not a member of the Brooklyn Avenue Club.

Q. To your knowledge was he a member of the El Sereno Club?

A. I do not remember the respondent as being a member of the El Sereno Club.

Q. You have identified one other club or unit of the Communist Party, do you recall exactly what the true name of that other unit was?

A. If you are referring to the Forty-fifth I understood it at that time to be just the Forty-fifth Concentration Club only.

Q. The word Mexican did not appear in the official name of that organization?

A. It did not.

Q. Was the Forty-fifth Concentration Club a unit of the Communist Party of the United States?

A. Yes.

Q. Did you know Joe Gastelum to be a member of the Forty-fifth Concentration Club?

A. Yes, sir.

Q. Do you recall at this time about how many meetings of the Forty-fifth Concentration Club in which you have seen Joe Gastelum?

A. I remember about two or three meetings.

[fol. 81] Q. At any of those meetings in which you saw Joe Gastelum were any persons present who to your knowledge were not members of the Communist Party?

A. At those meetings there were no other persons present that were not members of the Communist Party.

• • • • • • •

Q. The question is were these meetings in which you saw Joe Gastelum in the Forty-fifth Concentration Club official meetings of the unit?

A. That is right, sir.

• • • • • • •

Q. You testified that you attended approximately two or three meetings of the Forty-fifth Concentration Club at which the respondent, Mr. Gastelum, was present, is that correct?

A. That is correct.

Q. Approximately when did these meetings take place, the month or day isn't necessary?

A. In 1951 and 1949.

Q. Do you limit it just to these two years or the period from '49 to '51?

A. I do not remember the years from 1949 to 1951 but I was present at one meeting in 1951 and another in 1949 with the respondent.

• • • • • • •

[fol. 83]

EXCERPTS FROM TRANSCRIPT OF THE DEPORTATION HEARING ACCORDED APPELLANT BY THE IMMIGRATION AND NATURALIZATION SERVICE—July 9, 1956

Testimony of Witness DANIEL SCARLETTO

• • • • • • •

Counsel to Witness:

Q. Prior to the time that you say that you were introduced to the respondent in 1949 had you ever seen the respondent before?

A. I don't recall right now seeing him before. I can't think right now where I had seen him before.

Q. Referring to the transcript at Page 183, your testimony of May 7 of this year in this case, I direct your attention to this portion of your testimony:

Question: "Did Joe Gastelum attend meetings regularly of the El Sereno Club?" And your answer was—

[fol. 84] (To Examining Officer: Do you have it, counsel?)

"I only saw him there a couple of times, because I was only in the club for a couple—few months and I saw him there a couple of times."

Do you mean—that's the end of your testimony—do you mean that you only saw Joe Gastelum two or three times?

A. Yes.

Q. By "couple" you mean two or three?

A. Yes.

Q. How much time elapsed between the time that you first saw him at a meeting of the El Sereno Club in 1949 until the next time that you saw Joe Gastelum at a meeting of the El Sereno Club?

A. I can't remember that right now.

Q. Do you know whether it was a matter of a day or a week or a month?

A. No, I don't remember just how much time elapsed there. That is, I just can't remember that now.

Q. Well, do you recall how much time approximately elapsed between the time that you first met Joe Gastelum at a meeting of the El Sereno Club and the last time that you saw him at a meeting of the El Sereno Club?

A. I don't remember that—that time.

Q. You have no recollection whether it was a day or a month or a year, is that correct?

A. Well, it wouldn't be a year, but I don't think that—I can't remember the time that elapsed between the few times that I have seen him.

Q. Well, do you have any recollection at all of the second time that you saw Joe Gastelum at a meeting of the El Sereno Club?

A. No, I can't remember how much time was in between the times that I had seen him. That I don't remember. If I did I would be glad to help you.

Counsel: I move to strike that answer as not being responsive.

[fol. 85] To Stenographer: Will you repeat the question again, please? (Question read back)

Inquiry Officer to Witness: In other words counsel isn't interested now in the lapse of time.

Counsel: We are through with that.

Inquiry Officer to Witness:

Q. Just whether you remember the date?

A. No.

Q. Of the second meeting. Is that clear?

Counsel to Witness:

Q. Is my question clear?

A. Yes, you want to know the times in between, if I saw him today, if I saw him next week.

Q. No. No.

To Stenographer: Will you repeat the question? I think I phrased it in that particular manner. I will rephrase it if it isn't clear.

(Question read back)

Witness: No.

Counsel to Witness:

Q. Do you have any present recollection, Mr. Scarletto, of the last time that you saw Mr. Gastelum at a meeting of the El Sereno Club in 1949?

A. No.

Q. Do you have a present recollection of the first time that you saw Mr. Gastelum at a meeting of the Mexican Concentration Club?

A. Of the first time?

Q. Yes.

A. When we had our first meeting, why we were all there.

Counsel: I move to strike that as not being responsive. You either do or you don't remember.

Witness: Yes, I seen Joe at our first meeting.

Counsel to Witness:

Q. Your answer to my question is yes, then?

A. Yes.

[fol. 86] Q. You have a present recollection. How many times did you see Mr. Gastelum at meetings of the Mexican Concentration Club?

A. Oh, he was at several of those meetings.

Q. By "several" do you mean more than a couple?

A. I certainly do.

Q. How many do you mean?

A. Oh, it could be 15, 16 times.

Q. By "could be" you mean—

A. Several times.

Q. —that you recall 15 times?

A. No, I don't recall. I am just saying that it was several meetings that I have seen him there over the period that I was—

Q. But you have no recollection of 15 separate occasions when you met him, is that what you mean?

A. I am just referring to that as being several times, yes.

Q. Well, do you have any present recollection of having seen him on 15 separate occasions at meetings of the Mexican Concentration Club?

A. No, I can't remember—well, it was several times that I saw him at these meetings, but I—

Q. But not 15?

A. It could be 15, it could be more.

Q. You have no present recollection in regard to the number of times?

A. Not the exact number, no.

. . . . . .

[fol. 87]

SUPREME COURT OF THE UNITED STATES

No. 39—October Term, 1962

JOSE MARIA GASTELUM-QUINONES, Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 293 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 88]

SUPREME COURT OF THE UNITED STATES

No. 293—October Term, 1962

JOSE MARIA GASTELUM-QUINONES, Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 39 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.